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Supreme Court, U.S.
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No. 92-634

IN THE

Supreme Court Of The United States

October Term, 1992

STATE OF ALABAMA,

Petitioner,

v.

McRAY GINGO and
ATLAS INDUSTRIAL PAINTERS, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision of the Supreme Court of Alabama that certain scientific test results were inadmissible as evidence at trial after State of Alabama authorities destroyed or allowed destruction of all evidence against Respondents is so fundamentally wrong and in irreconcilable conflict with decisions reviewable by this Court that a writ of certiorari should be granted.

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STATEMENT OF THE CASE

INTRODUCTION

The Respondents, McRay Gingo and Atlas Industrial Painters, Inc., were indicted for improperly disposing of old highway striping paint, and not complying with administrative requirements and directives of the Alabama Department of Environmental Management (ADEM). The alleged illegalities stem from the State's claim that the paint was hazardous waste, as defined by ADEM regulations, due to an "ignitability" characteristic which required specialized testing for identification of such. The unlawful quality of the paint could not be determined from simple observation, and tests were necessary for the State to meet its burden of proof.

Shortly after the Respondents were arraigned, a comprehensive discovery motion was filed pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and Temporary Rule 18 of the *Alabama Rules of Criminal Procedure*, specifically requesting production of the paint, hazardous waste, tangible evidence, "Brady" material, etc., and information pertaining to said items. The trial court granted the motion, and thereby ordered production (C.R. 10-16). The State responded by stating that the evidence at the ADEM laboratories had been destroyed; however, other paint sample evidence being kept at the EPA laboratory was not produced, and was destroyed approximately six months after the discovery order. The State thereafter informed that it intended to use the test results obtained at the EPA laboratories as evidence in the case.

EVIDENCE

The trial court conducted a pre-trial admissibility of evidence hearing in accordance with the Alabama Rules of Criminal Procedure. At the hearing, an ADEM investigator testified that he was aware a criminal prosecution might result upon first learning of the paint drums, and he engaged in a number of conversations about criminal prosecution

with ADEM officials before any of the evidence samples were destroyed. He testified that ADEM had no standard operating procedure for what to do with evidence obtained in criminal cases (R.T. 28-29). He stated he was aware from his experience in civil cases that alleged violators often want to perform independent tests upon government evidence as government tests are not infallible (R.T. 37, 39). He said he had the authority to have prevented destruction of the ADEM samples.

The ADEM investigator further said that he notified the Environmental Protection Agency (EPA) of the evidence site for purposes of clean-up. He testified he knew that after clean-up, the EPA would transport the material to a hazardous waste facility for treatment, storage and disposal. He acknowledged that ADEM had a good professional, working relationship with the EPA (R.T. 31-34).

The ADEM lab director testified that evidence samples remained in his care about four and one-half or five months, and were disposed of about a week after the case was referred to the Attorney General's Office for prosecution. He admitted he heard the samples were collected in connection with a possible criminal or court case, and he had authority to preserve them, but did not do so.

An EPA official testified that the evidence samples acquired by the EPA would have been preserved if the State had so requested. She also testified that the EPA would have preserved the evidence samples as part of its standard operating procedure if she had been made aware of the state court discovery order (R.T. 63). She further testified that the EPA's standard operating procedure is to save evidence in criminal cases (R.T. 52). She said she was aware of this case, but did not know whether it was civil or criminal. She recalled communications with the ADEM investigator, and shared the EPA test results with ADEM.

The EPA lab chief testified that the lab preserves test samples upon request of the referral party. However, regardless of any requests, test samples will not be destroyed if the

lab is made aware that such are involved in a criminal proceeding (R.T. 79-80). The lab chief identified the evidence samples at the EPA laboratory as having been destroyed approximately six months after the trial court's discovery order (R.T. 86).

PREVIOUS COURT DECISIONS

The trial court found that all evidence had been destroyed through no fault of the Respondents, and ordered the test results excluded as trial evidence. The order is reproduced in Appendix "A" to the Petition for Writ of Certiorari. The trial court did not state the specific basis in law for its action, i.e., whether it was ruling upon U.S. or State Constitutional grounds, or whether it was simply ruling pursuant to authority granted by Rule 18.5 (a), *A.R.Crim.P.Temp.* (now Rule 16.5, *A.R.Crim.P.*), which provides

> "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, or with any other order issued pursuant to this rule, the court may ... prohibit the party from introducing evidence not disclosed; or enter such order as the court deems just under the circumstances."

The State asserts in brief the trial court made a definite finding of no bad faith. That is not correct. The Respondents vigorously contended the State had acted in bad faith, and the trial court suppressed the evidence after considering such claim. The court simply made no specific comment in regard thereto in its written decision.

The State appealed the ruling of the trial court, and the Alabama Court of Criminal Appeals reversed. The Respondents petitioned for writ of certiorari, and the Supreme Court of Alabama reversed the Court of Criminal Appeals. Argument was presented to the Court that the test results could be suppressed on the basis of federal due process constraints, state due process constraints, or the discretionary au-

thority provided the trial court by the Rules of Criminal Procedure. The Supreme Court reviewed *Arizona v. Youngblood*, 488 U.S. 51 (1988), and *California v. Trombetta*, 467 U.S. 479 (1984), applied the analysis set forth in those cases, and determined that suppression of the test results was appropriate. The Court does not specifically state that its decision is based upon the 14th Amendment of the United States Constitution. However, the Court held that *under the facts of this case*, it would be fundamentally unfair to allow the State to use test results of the destroyed evidence at trial. The Court's opinion is reproduced in Appendix "C" of the Petition for Writ of Certiorari.

REASONS THE WRIT SHOULD BE DENIED

I. THE ALABAMA SUPREME COURT OPINION DOES NOT CONFLICT WITH UNITED STATES SUPREME COURT CASES.

In the Alabama Supreme Court's narrowly written opinion, the Court states on several occasions that under the facts of this case, it would be fundamentally unfair to allow the State to use test results of the destroyed evidence. The Court determined that factors considered important in *Arizona v. Youngblood*, 488 U.S. 51 (1988) and *California v. Trombetta*, 467 U.S. 479 (1984), were not present in this case. The facts in this case were markedly different, the interests of justice weighed differently, and a different result was justified. However, the analysis applied was essentially the same. The Court identified several instances of blatant misconduct by the State which it refused to tolerate, and which created an impossible situation for the Respondents. The quality of the State's conduct and the degree of prejudice to the Respondents were such that exclusion of evidence was warranted. See *United States v. Belden*, 757 F. 2d 671 (9th Cir. 1992). Bad faith was clearly evident, as the Respondents have claimed from the outset.

In *Arizona v. Youngblood, supra*, the Defendant was convicted of child molestation, sexual assault and kidnapping. The thrust of the State's case was the victim's eyewitness testimony identifying his assailant. The Defendant complained that if police had refrigerated the clothes of the victim, he could have performed tests on semen stains that might have exonerated him.

This Court found no due process violation. The Court emphasized that police had acted in accordance with their normal or standard procedure in seizing the child's clothing, and having a physician administer a sexual assault kit. The Court also stressed that the State did not offer the clothing, or tests thereon, as evidence in its case-in-chief, but chose to prosecute with other apparently convincing evidence. The Court indicated that police had acted within reasonable bounds in preserving evidence, and stated that police had no constitutional duty to perform any particular tests. The Court noted that police did not conceal anything from the Defendant, and in fact, made the clothing, sexual assault kit, and other physical evidence available to the Defendant. The Court ultimately concluded that the Defendant did not show any bad faith by law enforcement, and the failure to preserve the potentially useful evidence did not constitute a denial of due process as guaranteed by the 14th Amendment of the United States Constitution.

In *California v. Trombetta, supra*, various defendants were charged with driving under the influence of alcohol after being stopped by law enforcement officers for suspicion of drunk driving. They claimed they were denied due process because breath samples used in an Intoxilyzer machine were not preserved. The Court recognized as important the fact that officers acted in good faith and in accord with normal practice in not keeping the breath samples. Presumably, evidence of guilt or innocence could also be presented from the observations of the officers or other persons present. The Court pointed out that the Defendants had alternative means of demonstrating their innocence. Further, the Court stated

that the duty imposed on states to preserve evidence must be limited to that which might be expected to play a significant role in the suspect's defense. The Court analyzed a number of safeguards, and concluded it was highly unlikely that preserved samples would have exculpated the Defendants.

The Alabama Supreme Court reviewed the factors deemed significant in *Youngblood* and *Trombetta*, and found them absent or weighing favorably for the Respondents in this case. The standard procedure for the EPA was to maintain evidence samples in criminal cases — but the evidence kept at the EPA laboratory in this case was destroyed *contrary* to standard procedure. The EPA took the evidence at the instance of the State during the course of a State investigation, and EPA officials testified it would not have been destroyed if the State had so requested. Further, destruction of the evidence in violation of standard procedure occurred *six months after* the trial court had entered its discovery order. The EPA officials also testified that the evidence would not have been destroyed if they had been informed of the discovery order. The State declared that it intended to use the EPA test results against the Respondents. The State argues that it had no control over the EPA. However, the Alabama Supreme Court found untenable the State's position that it could work in such close contact with the EPA and use the EPA test results at trial, but could not obtain preservation of the evidence samples or compliance with the discovery order.

The Alabama Court also acknowledged that the evidence at the ADEM laboratory was not destroyed in accordance with standard procedure, as ADEM had no standard procedure concerning evidence in criminal cases. ADEM officials were aware of the possible criminal case, knew the Respondent might want the samples for independent testing, admitted the potential for errors in testing, and yet still disposed of the samples after the case was assigned to the prosecuting authority. Lack of any policy where such is standard for similar agencies, e.g., the EPA, was inexcusable. Considering the circumstances, the Court refused to permit the State to act unreasonably to the extreme prejudice of the Respondents. The

Court did note that ADEM now has a procedure for maintaining evidence in criminal cases.

The Alabama Supreme Court also considered the fact that the test results were an essential part of the State's case-in-chief. The Court notes that the State had to use the test results to carry its burden of proving the hazardous waste violations. The test results were not just corroborative evidence — the test results were *the* evidence that the paint was hazardous waste. The test results were not just tangentially related to the case, they don't just confirm what could be proven by other means, they were the requisite proof for conviction. With all physical evidence having been destroyed and no way to independently check, verify or refute the alleged unlawful nature or chemical composition of the said evidence, the Respondents were left in an extremely unfair and defenseless position. The Supreme Court concluded that was unjust.

In *Youngblood* and *Trombetta*, the defendants were arrested or stopped because of other incriminating evidence. The Alabama Court notes that the Respondents were indicted solely because of the tests done on the samples. The State failed to act reasonably in not preserving the evidence, and the Respondents have no real alternative means to demonstrate innocence. The destroyed evidence was material from the outset, and should certainly have been expected to play a significant role in the Respondents' defense, and State officials recognized that fact. The conduct of the State constituted bad faith.

The destroyed evidence is so critical to the Respondents as to make a criminal trial fundamentally unfair. See *Youngblood*, 488 U.S. at 61, (*Stephens, J.*, concurring in the result). The Alabama Supreme Court agrees. However, the Court's opinion closely follows and incorporates the analysis set forth in the *Youngblood* and *Trombetta* majority opinions in reaching the proper result in this case. The State's suggestion that the Supreme Court of Alabama has conceived some unfounded and unsupported exception to due process law is without merit.

II. THE ALABAMA SUPREME COURT OPINION DOES NOT CONFLICT WITH FEDERAL AND STATE CASES.

The State cites several federal and state cases which it says conflict with the decision by our state Supreme Court. The State's contention is wrong. While it is true that no due process violations were found in the cited cases, the underlying facts and policy considerations were substantially different therein.

In *United States v. Belden, supra*, police cut 1100-1200 marijuana plants at the ground level in accordance with routine procedure rather than digging up the plants by the roots. The plants were available for inspection by the defendant, and the defendant had access to a video walk-through of the grow. The Ninth Circuit said that the circumstances did not indicate bad faith, and the quality of the government's conduct and the degree of prejudice to the defendant did not mandate exclusion.

In *United States v. McKie*, 951 F. 2d 399 (D.C. Cir. 1991), certain crack cocaine and its packaging disappeared somewhere between the DEA laboratory and the trial court property room. The court noted that the drugs were apparently available to the defendant for independent testing before trial. Additionally, the government established a chain of custody from the crime scene to the lab, and the chemist was available to testify. The trial court specifically found a lack of bad faith. The court did not think the defendant was prejudiced or that the lost evidence was likely exculpatory. The court could not say that the trial court was clearly erroneous in its ruling, or that it committed an abuse of discretion in its control of the proceedings before it.

In *United States v. Pirre*, 927 F. 2d 694 (2nd Cir. 1991), the court ruled that due process was not violated by destruction of five of fifteen cocaine packages due to an administrative storage concern. Testimony was presented that the destroyed packages were similar to those that remained, and the defendant never sought to test or examine the remaining evidence. Further, the court noted that at trial, the defendant seemed

to admit, and certainly did not dispute, the later contested amount of cocaine.

In *United States v. Malbrough*, 922 F. 2d 458 (8th Cir. 1990), police seized numerous marijuana plants, and only destroyed those plants not randomly selected and used as test samples. The marijuana plants that were destroyed were done so pursuant to a court order and a specific state statute. At trial, the defendant admitted growing marijuana. The court found there was no bad faith or due process violation in the case.

In *United States v. Donaldson*, 915 F. 2d 612 (10th Cir. 1990), marijuana was destroyed by DEA agents and the defendants contested its weight at the sentencing hearing. In *United States v. White*, 766 F.Supp. 873 (E.D. Wash. 1991), hazardous waste pesticides were destroyed, although samples remained available for testing by the defendant. The courts found no due process violations.

In *United States v. Mabe*, 412 S.E. 2d, 386 (S.C. 1991), cocaine was destroyed after the defendant entered a plea of guilty to trafficking in cocaine. Subsequent thereto, the defendant was successful in obtaining post conviction relief, and the guilty plea was vacated. The court declared that the cocaine appeared to be destroyed in reliance upon the defendant's guilty plea, and in accordance with normal procedure, and hence there was no denial of due process.

In *Commonwealth v. Demis*, 588 A. 2d 30 (Pa. Super. 1991), a blood sample was destroyed in a driving under the influence of alcohol case. State law provided that the defendant had a right to have a physician administer an additional test, but not re-test the original sample. Also, the defendant did not allege the sample was exculpatory or that evidence could not reasonably be obtained by other means. The court found no due process violation.

The State also argues that it cannot be held responsible for destruction of the paint samples left at the EPA laboratory. However, a number of courts have refused to allow the prosecution to utilize evidence not furnished to the defendants where the prosecution claimed that said evidence was actually

in the possession of some other governmental agency. As stated in *United States v. Trevino*, 556 F. 2d 1265, 1272 (5th Cir. 1977), a contrary holding would enable the prosecutor "to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial." That statement was echoed in *Martinez v. Wainwright*, 621 F. 2d 184 (5th Cir. 1980), where the Court held that the failure to furnish a copy of the defendant's "rap sheet", retained by the medical examiner after specific request, violated the defendant's due process rights.

In *United States v. Bryan*, 868 F. 2d 1032 (9th Cir. 1989), the Court vacated and remanded a mail fraud conviction for failure to produce documents outside Oregon and/or in the possession of federal investigatory agencies. The Court stated "If a federal prosecutor has knowledge of and access to exculpatory information as defined in *Brady* and its progeny that is outside the district, then the prosecutor must disclose it to the defendant." *Id.* at 1037. "The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant." *Id.* at 1036.

In *Yanetta v. State*, 320 So. 2d 23, 24 (Fla. 3rd Dist. Ct. App. 1975), the Court declared that a defendant is "properly allowed discovery as to the criminal records of the State's witnesses to the extent that the information is in the actual or constructive possession of the State, not limited to that in the physical possession of the State Attorney's office, *and including data obtainable from the FBI.*"

The State cites three cases in support of its position, but they are inapposite here: *United States v. Harris*, 738 F. 2d 1068 (9th Cir. 1984) (non-disclosed tapes bore only incidentally on merits of case, and no plain error in trial court's ruling); *Thor v. United States*, 574 F. 2d 215 (5th Cir. 1978) (no abuse of discretion by trial court in failing to subpoena address book pursuant to Fed. R. Crim. Proc. where very small likelihood that persons could be located, and address book

was not considered evidentiary pursuant to rules); *United States v. Bermudez*, 526 F. 2d 89 (2nd Cir. 1975) (alleged new evidence would not have materially benefited defendant, and said evidence had been available to counsel in another proceeding). The involvement of ADEM and the testimony of EPA officials in this case, unquestionably demonstrate that the state could and should have prevented destruction of the evidence samples maintained at the EPA lab.

CONCLUSION

The petitioner does not raise any "certworthy" questions that justify the granting of a writ of certiorari to the Supreme Court of Alabama. The petition does not present this court with any significant conflict with the decisions of this court or those from other jurisdictions, fundamental error below has not been demonstrated, and no other compelling reason has been provided to grant the writ. Consequently, the petition is due to be denied.

Respectfully submitted this 7th day of December, 1992.

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